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No. 70-117

In the Supreme Court of the United States

OCTOBER TERM, 1971

CHARLES JOSEPH KASTIGAR AND MICHAEL GORDEAN STEWART, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (A. 71–76) is reported at 440 F. 2d 954.

JURISDICTION

The judgment of the court of appeals was entered on March 10, 1971 (A. 69–70). The petition for a writ of certiorari was filed on April 8, 1971, and was granted on May 17, 1971 (A. 77). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a grand jury witness, claiming the privilege against self-incrimination, may constitutionally be compelled to testify under an immunity statute which bars any use of the compelled testimony or its fruits but does not bar prosecution of the witness regarding transactions about which he may testify.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person * * * shall be compelled in any criminal case to be a witness against himself * * *.

Section 201(a) of the Organized Crime Control Act of 1970, 84 Stat. 927, 18 U.S.C. 6002, provides:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to—
>
> (1) a court or grand jury of the United States,
>
> (2) an agency of the United States, or
>
> (3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,
>
> and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly

derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.[1]

STATEMENT

On February 11, 1971, the United States District Court for the Central District of California adjudged petitioners in civil contempt for refusing to answer questions before a grand jury after having received grants of immunity under Section 201(a) of the Organized Crime Control Act of 1970, 18 U.S.C. 6002. The court committed each to imprisonment until such time as he answered the questions or the term of the grand jury had expired (A. 49–51). Following an expedited appeal, the court of appeals affirmed on March 10, 1971 (A. 69–76).

The relevant facts are as follows: On September 9, 1970, petitioner Kastigar appeared pursuant to subpoena before a grand jury in the Central District of California and refused to answer questions on the ground that his answers might tend to incriminate him (A. 58). Thereafter, subpoenas were issued for the appearance of both petitioners before the grand jury on February 4, 1971. Before their appearance, the government, noting that Kastigar had refused to testify and that Stewart was likely to refuse to testify on the basis of the privilege against self-

[1] 18 U.S.C. 6003 provides the method for securing the immunity.

incrimination, applied to the district court for orders directing each to answer questions and produce evidence before the grand jury under the immunity provisions of 18 U.S.C. 6002 and 6003. This application was "made in good faith" and with the approval of the Attorney General (A. 54–56, 58–60).

Petitioners opposed the order primarily on the ground that the statutory immunity provisions were invalid under *Counselman* v. *Hitchcock,* 142 U.S. 547, in that they were not coextensive with the Fifth Amendment privilege against self-incrimination, because they granted "use" rather than "transactional" immunity (A. 5–8). Following a hearing, the district court rejected this contention (A. 30–37). It ordered petitioners to appear before the grand jury and answer its questions under the statutory grant of immunity (A. 57, 61).

On February 11, when petitioner Kastigar appeared before the grand jury, the following colloquy ensued (A. 48):

> Q. Mr. Kastigar, as we told you before, the Grand Jury has received a great deal of information concerning a situation in which you had orthodontic braces placed on your teeth just prior to reporting for military induction and had them removed just after a word [sic] by a Dr. Bernard Bender, with offices at 8328 De Soto in Canoga Park.
>
> Would you tell us, please, how that came about?

A. I'm sorry, I decline to say anything about that on the basis that my answer may tend to incriminate me and on the advice of counsel.

* * * * *

Q. Do you intend to take that same position with respect to all questions concerning this subject matter, so we don't waste your time or our time?

A. I intend to take the Fifth Amendment.

On the same day, petitioner Stewart also appeared before the grand jury and the following colloquy occurred (A. 48–49):

Q. Would you please tell us how it came about that you went to Dr. Bender for the so-called dental services which I described?

A. Okay. On that I will have to respectfully decline to answer on the ground it may incriminate me.

Q. You have been told here in court by the judge that you are under the immunity statute and nothing you say can be used against you?

A. I understand.

Q. Are you refusing to answer on any other grounds or for any other reason, other than self-incrimination?

A. I will use self-incrimination.

Thereafter, petitioners were brought before the district court. Each persisted in his refusal to answer any questions. The court then found both guilty of civil contempt and sentenced them to imprisonment until they answered the questions or for the term of the grand

jury (A. 49–51). In affirming, the court of appeals expressed the view that under recent decisions of the Court—primarily *Murphy* v. *Waterfront Commission*, 378 U.S. 52—transactional immunity is not essential to meet Fifth Amendment requirements and that the broad use immunity granted by 18 U.S.C. 6002 is sufficient to satisfy the protection afforded by the privilege against self-incrimination (A. 71–76, particularly at 72–75).

ARGUMENT

INTRODUCTION AND SUMMARY

This case arises from the recent immunity provisions enacted by Congress in the Organized Crime Control Act of 1970 (18 U.S.C. 6002, 6003). These provisions were enacted to replace numerous witness immunity statutes, *e.g.*, 18 U.S.C. 2514, with a single general statute. Under the repealed statutes, a witness compelled to testify could not be prosecuted either in federal or state court for or on account of any transaction, matter or thing, concerning which he had testified (*i.e.*, he received transactional immunity). Under the terms of the generally applicable 1970 Act whenever a witness is compelled to testify, such testimony or its fruits may not be used against him in either a federal or state prosecution (*i.e.*, use and derivative use immunity).

The issue squarely posed here is whether the scope of the immunity provided by the 1970 Act is sufficient to compel a witness to give otherwise incriminating information—whether, in short, it provides an immunity coextensive with the protection afforded by the

self-incrimination clause of the Fifth Amendment. Thus "the important question" left undecided last Term in *Piccirillo* v. *New York*, 400 U.S. 548,[2] is presented by this case.[3]

At bottom, two basic principles are involved in resolving the issue. On the one hand, at the core of our judicial system is the settled notion that "the public has the right to every man's evidence."[4] It is self-evident that without the ability to compel the testimony of every citizen as to matters within his knowledge, law enforcement officials would be severly hampered in the prosecution of those who violate the criminal laws. On the other hand, just as firmly embedded in our jurisprudence is the Fifth Amendment privilege that "no person * * * shall be compelled in any criminal case to be a witness against himself." This Court has repeatedly recognized that this constitutional provision "reflects many of our fundamental values and most noble aspirations" *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 55; *Ullmann* v. *United States*, 350 U.S. 422, 426.

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[2] The same legal issue is posed in *Zicarelli* v. *New Jersey State Commission of Investigation*, No. 69–4, this Term.

[3] With four Justices dissenting, the writ was dismissed in *Piccirillo* as having been improvidently granted, because the New York statute there involved had been construed by the New York Court of Appeals as granting "transactional" immunity.

[4] This phrase was referred to in *Piemonte* v. *United States*, 367 U.S. 556, 559 n. 2, as one which "cannot be too often recalled." See also *Ullmann* v. *United States*, 350 U.S. 422, 439 n. 15; *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 94–95 (concurring opinion).

Sometimes a witness has knowledge about the criminal activities of others, yet is himself involved in the same or in other criminal activities. Congress and the states have recognized that in these situations it may be impossible to prosecute others without the testimony of the person who is asserting the privilege against self-incrimination. Immunity statutes recognize and seek to avoid this collision: they rest on the premise that a witness may be compelled to answer questions—despite a claim of the privilege against self-incrimination— but only if the statutory protection against his prosecution is coextensive with the privilege against self-incrimination. What is to be resolved here, therefore, is whether "transactional" immunity is necessary to meet constitutional requirements. If that is true, the 1970 immunity provision is invalid.

In Point I we argue that no such sweeping reading of the privilege is required to give it the significant place it holds in the hierarchy of constitutional values. We urge that neither the purposes served by the privilege nor the decisions of this Court require the expansive reading attributed to the privilege by petitioners. Indeed to adopt such a reading would undercut the interests of society in the prosecution of crime without any justifiable benefit accruing to the individual invoking the privilege. Such a reading would also be inconsistent with the import of *Murphy* v. *Waterfront Commission,* 378 U.S. 52, and other recent decisions of this Court.

We submit that the earlier transactional immunity statutes passed by Congress were designed to comply with dictum in *Counselman* v. *Hitchcock*, 142 U.S. 547, and confer a broader grant of immunity than is constitutionally required. After extensive consideration which culminated in the 1970 Act, Congress reached the considered legislative judgment that the competing interests of the public's right to information and the individual's constitutional right not to incriminate himself are reconcilable without immunizing a witness entirely from prosecution for an offense for which his testimony is not needed and will not be used in any way against him. In short, it concluded that the dictum in *Counselman* was just that and not a directive of constitutional proportions. In making that judgment, Congress relied primarily on this Court's decision in *Murphy* v. *Waterfront Commission, supra.* The present statute is a considered effort by Congress to assure, in a constitutional manner, the flow of information without granting a reward to those who would use the Fifth Amendment as a sword rather than a shield. *Harris* v. *New York*, 401 U.S. 222.

Finally, we argue that there are practical situations in which a "use" rather than a "transactional" immunity statute will serve the interests of society without, in any way, cutting down on the protections to which a witness is entitled under the privilege; and that the courts can fairly administer the restriction on use imposed by Section 6002.

In Point II we contend that petitioners have no basis for the contention that the Fifth Amendment bars the enactment of any immunity statute at all.

I

THE USE IMMUNITY STANDARD ADOPTED BY CONGRESS IN 18 U.S.C. 6002 IS COEXTENSIVE WITH THE PROTECTION AFFORDED BY THE PRIVILEGE AGAINST SELF-INCRIMINATION

The witness immunity statute, 18 U.S.C. 6002, involved in this case provides that if a witness, claiming the privilege against self-incrimination, is compelled to testify, "no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used" against him in a federal or state criminal prosecution. In urging that this provision is coextensive with the privilege against self-incrimination, we begin with an analysis of the purposes underlying the privilege and the critical decisions of this Court which have dealt with the immunity issue.

A. "USE" AND "DERIVATIVE USE" IMMUNITY IS FULLY CONSONANT WITH THE PRIVILEGE AGAINST SELF-INCRIMINATION

1. *The policies underlying the privilege against self-incrimination.*

The circumstances which prompted the adoption of the Fifth Amendment have been detailed in opinions of this Court and the writings of commentators. See, *e.g.*, *Ullmann* v. *United States*, 350 U.S. 422, 428; *Brown* v. *Walker*, 161 U.S. 591; *Quinn* v. *United States*, 349 U.S. 155, 161–162. See also Morgan, *The Privilege Against Self-Incrimination*, 34 Minn. L. Rev. 1–23 (1949); Levy, *Origins of the Fifth Amend-*

ment (1968); 8 Wigmore, *Evidence,* § 2250, pp. 267–295 (McNaughton Rev. 1961).[5]

This history reveals that the privilege was aimed at the evils of the Inquisition and the Star Chamber. It was designed to prohibit the government from using a man's compelled testimony to punish him. It was not, however, designed to allow a witness to use the privilege to shield others or to relieve himself from the central duty to give evidence. Indeed, as already noted (*supra,* p. 7), at the very essence of our judicial system is the proposition that "the public has the right to every man's evidence." The basic thrust of the Fifth Amendment was to carve out an exception to this testimonial duty to protect a variety of interests personal to the witness himself which were important enough to overcome his testimonial obligation. This Court summarized the complex of values protected by the privilege which justified this exception in *Murphy v. Waterfront Commission, supra,* 378 U.S. at 55, as follows:

> It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our

[5] An extensive analysis of the development of the privilege in England and its reception in this country is contained in the Brief for the National District Attorneys as Amici Curiae in *Zicarelli v. New Jersey State Commission of Investigation*, No. 69–4, this Term, pp. 11–19. That brief also contains, pp. 37–39, a summary of the modern British and Canadian approaches to immunity, indicating that the relevant statutes generally provide less broad protection than that afforded by Section 6002.

> sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load," 8 Wigmore, Evidence (McNaughton rev., 1961), 317; our respect for the inviolability of the human personality and of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States v. Grunewald,* 233 F. 2d 556, 581–582 (Frank, J. dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States,* 349 U.S. 155, 162.

See *Brown* v. *Walker,* 161 U.S. 591, 600; *Malloy* v. *Hogan,* 378 U.S. 1, 8; *Feldman* v. *United States,* 322 U.S. 487, 500 (dissenting opinion of Mr. Justice Black). That the privilege is not meant as a tool to shield others has found precise expression in other opinions of this Court. See, *e.g., Rogers* v. *United States,* 340 U.S. 367, 371, where this Court stated:

> Furthermore, the decisions of this Court are explicit in holding that the privilege against self-incrimination "is solely for the benefit of the witness," and "is purely a personal privilege of the witness."

Again in *Brown* v. *Walker, supra,* 161 U.S. at 597, 600, this Court noted that the privilege is "not for [the protection] of other parties," and is not "for the real purpose of securing immunity to some third person."

In short, the central principle that derives from the Fifth Amendment cases is that a citizen who is called upon to give testimony or information to the government need not incriminate *himself*. The privilege against self-incrimination confers a right to require the government to "shoulder the entire load"—to adduce the evidence against the accused without compelling him to provide the basis of his own guilt. At the same time, the witness has no proper claim to withhold information about others.[6] Indeed, he has a duty to disclose and is "bound to aid in the enforcement of the law." *Brown* v. *Walker, supra,* 161 U.S. at 600.

These basic purposes are not furthered by construing the privilege so broadly that society would be prohibited from requiring a person to testify even though that nothing he says or derives from what he says can be used against him. So long as he has that protection, the rights guarded by the privilege are fully protected. There is no reason that the state, at the cost of effective law enforcement should be required to give the witness any more—it need not provide him immunity that forecloses prosecution in situations where it has not been aided in any way by words out of his own mouth.

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[6] The First Congress, which proposed the Bill of Rights, thus enacted a statute making misprision of treason and felony a crime. 1 Stat. 112, 113. The legal duty to report the commission of known felonies was thereby imposed on any person who had learned that such crime had been committed.

A witness compelled to testify under a statute is given immunity coextensive with the privilege when the witness is placed in the same position with respect to a criminal prosecution after his testimony, as he was before. When the government is precluded from making any use of the testimony whatsoever, either directly or indirectly, the witness is, for Fifth Amendment purposes, in the same position as before he testified. The privilege against self-incrimination has been literally complied with. See the concurring opinion of Mr. Justice White in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 100–101. This is precisely what the present immunity statute achieves by its prohibitions against direct and indirect use.

Before its legislative history, which makes this purpose plain, is discussed (see infra, pp. 27–32), it is necessary to examine the pertinent decisions of this Court. In our view, except for "illusory support in a dictum" in *Counselman* v. *Hitchcock,* 142 U.S. 547 (Mr. Justice White concurring in *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 93), no contrary rule is required by these decisions; indeed the more recent holdings support the proposition that a use restriction standard of the kind involved here satisfies the requirements of the privilege against self-incrimination.

2. *The decisions of this Court.*

An analysis of the decisions of this Court regarding the necessary scope of immunity statutes must commence with *Counselman* v. *Hitchcock,* 142 U.S. 547, for that decision provided the underpinnings for the federal transactional immunity statutes which were enacted prior to the adoption of the 1970 Act. In that

case an immunity statute (Act of February 25, 1868, Rev. Stat. § 860) [7] provided in relevant part:

> No pleading of a party, nor any discovery or evidence obtained from a party or witness by means of a judicial proceeding in this or any foreign country, shall be given in evidence, or in any manner used against him or his property or estate, in any court of the United States, in any criminal proceeding or for the enforcement of any penalty or forfeiture. * * *

Counselman was called before a federal grand jury which was investigating alleged illegal rebates by officers and agents of various railroads including the Chicago, Rock Island and Pacific Railroad Company and the Chicago, Burlington and Quincy Railroad Company. He testified that he was in the grain business and that he principally shipped grain over the Rock Island and Burlington railroads. He refused to answer, on grounds of self-incrimination, questions whether he had obtained a rate other than the tariff rate for transportation of grain from railroads generally, and from the Rock Island railroad particularly, from points outside of Chicago. He also declined to

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[7] In 1857 Congress first adopted an immunity statute which protected against prosecution for any matter about which any witness testified before Congress. Act of January 24, 1857, Ch. 19, 11 Stat. 155. An abuse under this statute led to its repeal. See Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Developments and New Confusion*, 10 St. Louis U. L. J. 327 (1966).

The primary approach of the states in the Nineteenth Century was that of a use-restriction immunity. See 8 Wigmore, *Evidence* (McNaughton Rev. 1961); see also, *Ullmann* v. *United States*, 350 U.S. 422, 438.

answer questions concerning his knowledge of transportation by the Rock Island railroad at less than the established rate. When he persisted in his refusal, he was held in contempt. He then filed a petition for a writ of habeas corpus in the Circuit Court for the Northern District of Illinois. That court dismissed the writ, rejecting an argument that under the statute, Counselman might disclose facts which would open up sources of information to the government whereby it might obtain evidence to secure his conviction. The court said (44 Fed. 268, 271):

> If, through threats or fear of violence, a man confesses that he has committed murder, and states who was present at the time, and where the weapon and the dead body may be found, and he is afterwards put on trial for the offense, he cannot be confronted with his confession; but the person who saw the crime committed is a competent witness, although the prosecutor might never have known there was such a witness but for the confession, and it may be shown by others that the weapon and dead body were found where the defendant said they could be found.

This Court reversed. It specifically pointed out that the vice of the statute before it was that it "could not, and would not, prevent the use of [a witness'] testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding" or other derivative use of his direct testimony given under compulsion of the statute (142 U.S. at 564). It then reviewed the decisions of various state courts dealing with the question of derivative use. It

considered, *inter alia,* the decisions in *Emery's Case,* 107 Mass. 172, and *Cullen* v. *Commonwealth,* 24 Grattan 624 (Va.), which found such use statutes unconstitutional because they permitted derivative use of the witnesses' testimony (142 U.S. at 571–576). It also analyzed a New Hampshire case, *State* v. *Nowell,* 58 N.H. 314, which upheld a statute that forbade both the use of testimony against the witness and his prosecution for any offense disclosed by him (*id.* at 577–578). After extended discussion, the Court concluded that the federal statute was unconstitutional. It said, quoting in part from *Emery's Case* (142 U.S. at 585):

> It is a reasonable construction, we think, of the constitutional provision, that the witness is protected "from being compelled to disclose the circumstances of his offence, the sources from which, or the means by which, evidence of its commission, or of his connection with it, may be obtained, or made effectual for his connection without using his answer as direct admissions against him."

After striking that theme, the Court continued (*id.* at 585–586):

> We are clearly of opinion that no statute which leaves the party or witness subject to prosecution after he answers the criminating question put to him, can have the effect of supplanting the privilege conferred by the Constitution of the United States. Section 860 of the Revised Statutes does not supply a complete protection from all the perils against which the constitutional prohibition was designed to guard, and is not a full substitute for that pro-

> hibition. In view of the constitutional provision, a statutory enactment, to be valid, *must afford absolute immunity* against future prosecution for the offence to which the question relates. In this respect, we give our assent rather to the doctrine of *Emery's Case,* in Massachusetts, than to that of *People* v. *Kelly,* in New York; * * * Section 860, moreover, affords no protection against that use of compelled testimony which consists in gaining therefrom a knowledge of the details of a crime, and of sources of information which may supply other means of convicting the witness or party [emphasis added].

The "absolute immunity" language in the opinion was clearly unnecessary to the Court's decision. In *Emery's Case,* an immunity statute was found invalid because, like the statute before the Court in *Counselman,* it did not protect against derivative use of a witness' testimony. *People* v. *Kelly,* 24 N.Y. 74, on the other hand, which the Court also discussed in *Counselman,* had rejected the argument that to stand in place of the privilege, an immunity statute had also to protect against derivative use.[8] The correctness of the Court's decision in *Counselman* in holding the immunity statute before it invalid is not questioned, because "[i]t could not, and would not, prevent the use of [the defendant's] testimony to search out other testimony to be used in evidence against him or his property, in a criminal proceeding (142 U.S. at 564). It is undeniable

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[8] See generally the *amicus* brief for the National District Attorneys Association in *Zicarelli* v. *New Jersey State Commission of Investigation,* No. 69–4, this Term, pp. 21–37.

that a witness incriminates himself whether his testimony is used directly against him or as the means of seeking out other evidence to prove his guilt—and this was the issue actually decided in *Counselman*. Accordingly, there was no need for the Court in *Counselman* to go further and announce a transactional immunity standard. See Mr. Justice White concurring in *Murphy* v. *Waterfront Commission*, 378 U.S. 52, 105–106.

This dictum, as one commentator has observed, "surely * * * was a wrong turning at a critical point." McCormick, *Evidence* 285 (1954). Most significantly, it was this dictum, and not the Court's holding, which led Congress to provide transactional immunity in its new immunity statute in the Interstate Commerce Act of 1893, 27 Stat. 443, which was the basic form taken by immunity statutes until the adoption of the 1970 Act.

The bill, which became the Compulsory Testimony Act, was introduced in Congress some sixteen days after this Court decided *Counselman*. In introducing the bill, Senator Cullom stated that the previous statute had been held invalid in *Counselman* because it was "not as broad in its scope as the Constitution, giving immunity or security to the rights of a witness under the Constitution." 23 Cong. Rec. 573. He later explained that the new bill "followed the line of the Supreme Court" in the *Counselman* case. 23 Cong. Rec. 6333. Congressman Wise, who introduced the bill in the House, also remarked that "the whole scope and effect of the act is simply to meet the decision rendered recently by the Supreme Court" in the *Counsel-*

man case. 24 Cong. Rec. 503. In short, Congress enacted the 1893 statute [9] which became the model for the later transactional immunity statutes in direct response to the *Counselman* language.

In *Brown* v. *Walker,* 161 U.S. 591, this statute was upheld. The Court repeated the language from *Counselman* that the earlier statute did not prevent the derivative use of the witness' testimony and that no statute which leaves the witness subject to prosecution can supplant the constitutional privilege. 161 U.S. at 594. The Court also said (161 U.S. at 595):

> If * * * the object of the [privilege against self-incrimination] be to secure the witness against a criminal prosecution, which might be aided directly or indirectly by his disclosure, then if no such prosecution be possible—in other words, if his testimony operate as a complete pardon for the offence to which it relates—a statute absolutely securing to him such immunity from prosecution would satisfy the demands of the clause in question.

The Court was thus not presented with the issue whether a use-restriction statute which secured the witness against a criminal prosecution aided directly or indirectly by his disclosure could supplant the privilege.

The transactional statute presented in *Brown* was brought to this Court for reevaluation in *Ullmann* v. *United States,* 350 U.S. 422. In an opinion by Mr.

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[9] This new statute provided that "no person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing, concerning which he may testify, or produce evidence, documentary or otherwise * * *."

Justice Frankfurter, the Court upheld it. He pointed out that in *Brown* v. *Walker, supra,* this Court had ruled "that a statute which compelled testimony but secured the witness against criminal prosecution which might be aided directly or indirectly by his disclosures did not violate the Fifth Amendment's privilege against self-incrimination." 350 U.S. at 430. Significantly, in both *Brown* v. *Walker, supra,* and *Ullmann* v. *United States, supra,* the congressional scheme which adopted the "transactional" as opposed to the narrow "use" immunity statute made it unnecessary for this Court to determine whether a broad derivative use statute—like the one involved here—would be coextensive with the privilege.

Nor can Mr. Justice Frankfurter's statement in *Ullmann* that the 1893 statute had become "part of our constitutional fabric" (350 U.S. at 438) be read as freezing "transactional immunity" into the Constitution. If anything, the contrary is true; since shortly after that language he intimated that an immunity statute would be valid if it gave "complete amnesty" or prohibited "the use of the compelled testimony." In short, it was not until *Murphy* v. *Waterfront Commission,* 378 U.S. 52, that the Court considered immunity from use and derivative use.

In *Murphy,* the petitioners were subpoenaed to testify before a bistate (New York and New Jersey) commission investigating work stoppages at New Jersey piers. After refusing to respond to questions on the ground that the answers might tend to incriminate them, they were granted immunity from state

prosecution and continued to refuse to answer on the ground that they might incriminate themselves under federal law. Having that same day decided that the privilege against self-incrimination was applicable to the states, *Malloy* v. *Hogan,* 378 U.S. 1, the Court in *Murphy* squarely faced the issue whether, to be coextensive with the privilege, an immunity grant had to afford immunity from prosecution, or whether assurance that the testimony of a witness would not be used in any way was constitutionally sufficient.[10] This Court, in considering *Counselman,* quoted those portions of the opinion which noted that the statute there did not protect the witness from the use by the prosecution of the fruits of his testimony. 378 U.S. at 78–79. The Court in *Murphy* did not, however, mention the *Counselman* dictum that immunity from prosecution was a prerequisite of a valid immunity statute. Rather, *Murphy* held as a "constitutional rule" (*id.* at 79) that a state witness could be compelled to testify if "the compelled testimony and its fruits cannot be used in any manner by federal officials in connection with a criminal prosecution against him" (*ibid.*). The Court recognized that the exclusionary rule it fashioned would leave "the witness and the Federal Government in substantially the same position as if the witness had claimed his

[10] The issue could not be avoided. If, to meet Fifth Amendment standards, the state had to assure immunity from prosecution, all state immunity statutes would be invalid since a state lacks the power to preclude other states or the federal government from prosecuting. However, if the Fifth Amendment forbids only use of compelled testimony, the statutes are valid. See *Murphy*, 378 U.S. at 93, 100 (concurring opinion of Justice White).

privilege in the absence of a state grant of immunity" (*ibid.*) thus satisfying the test of coextensiveness.[11]

Mr. Justice White (joined by Mr. Justice Stewart) in a concurring opinion pointed out (*id.* at 92–93):

> * * * the Court does not accept the far-reaching and in my view wholly unnecessary constitutional principle that the privilege requires not only complete protection against any use of compelled testimony in any manner in other jurisdictions but also absolute immunity in these jurisdictions from any prosecution pertaining to any of the testimony given. The rule which the Court does not adopt finds only illusory support in a dictum of the Court and, as I shall show, affords no more protection against compelled information than does the rule forbidding federal officials access to statements made in exchange for a grant of state immunity. * * *

In this showing, Mr. Justice White stressed that obtaining an inadmissible confession or illegally seized evidence did not bar prosecution *per se* and, indeed, unlike those situations, in the use immunity context the defendant did not have any initial burden to show that the government had acted illegally. He further noted that under an absolute immunity standard the defendant may have a greater burden of showing

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[11] As a procedural matter, the Court noted that "[o]nce a defendant demonstrates that he has testified, under a state grant of immunity, to matters related to the federal prosecution, the federal authorities have the burden of showing that their evidence is not tainted by establishing that they had an independent, legitimate source for the disputed evidence." 378 U.S. at 79, n. 18.

he had received immunity "where the relationship between the testimony and the prosecution is not obvious or where the immunity is acquired as a result of testimony before a grand jury or in an *in camera* administrative proceeding" (*id.* at 102–104). Finally, although recognizing that the continuing validity of the *Counselman* dictum was not involved in *Murphy*, Justice White expressed the view that not only was a use restriction constitutionally sufficient where separate sovereignties were involved but also that it was "possible for a federal prosecution to be based on untainted evidence after a grant of federal immunity in exchange for testimony in a federal criminal investigation." 378 U.S. at 106.

This language of the concurring opinion confirms what is the plain import of the decision itself in *Murphy*. The Court there held that if immunity granted by a state is to be effective under the Fifth Amendment it must reach federal prosecutions, for "the constitutional privilege against self-incrimination protects a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law." 378 U.S. at 77–78. In *Malloy v. Hogan, supra,* decided the same day, the Court held that the privilege against self-incrimination applies with the same force against the states as the federal government, because the Fourteenth Amendment does not apply a " 'watered-down, subjective version of the individual guarantees of the Bill of Rights * * *.' " 378 U.S. at 10–11. Thus the Court held that the Fifth Amendment privilege

against self-incrimination applies in full force against the states, that it protects against prosecution by governments other than the one granting immunity, and that when a state grants immunity, use and derivative use immunity are sufficient in terms of possible federal prosecution. It follows that such immunity must also be sufficient in respect to prosecution by the sovereignty granting immunity, be it federal or state.[12] If transactional immunity were required and the version of the Fifth Amendment applicable to the states were not "watered-down," then states could not grant immunity at all, since they lack power to give absolute immunity from federal prosecution; and *Murphy* would have been decided differently.

Since *Murphy,* this Court has not decided the precise issue involved here—whether use immunity is constitutionally sufficient where the jurisdiction which compelled the testimony is the same jurisdiction which later seeks prosecution. See *Piccirillo* v. *New York,* certiorari dismissed as improvidently granted, 400 U.S 548. See also *United States* v. *Freed,* 401 U.S. 601; *Stevens* v. *Marks,* 383 U.S. 234, 244, and concurring opinion of Harlan, J., at 249–250; *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79–80; *California* v. *Byers,* No. 75, Oct. Term, 1970, decided May 17, 1971 (Harlan, J., concurring opinion).

Nevertheless, since *Murphy,* statements of this Court have intimated the constitutionality of the use-restric-

[12] See the dissenting opinion of Judge Van Dusen in *United States ex rel. Catena* v. *Elias,* No. 18,855, C.A. 3, decided September 2, 1971 (slip op. at 14–16).

tion concept. In *Gardner* v. *Broderick,* 392 U.S. 273, 276, both *Counselman* and *Murphy* were cited for the proposition that:

> Answers may be compelled regardless of the privilege if there is immunity from federal and state use of the compelled testimony or its fruits in connection with a criminal prosecution against the person testifying.

See also *Spevack* v. *Klein,* 385 U.S. 511, 519–520 (concurring opinion); cf. *Uniformed Sanitation Men Assoc., Inc.* v. *Commissioner,* 426 F. 2d 619 (C.A. 2). Again, in *Marchetti* v. *United States,* 390 U.S. 39, 58, this Court viewed the government's suggestions that the registration and occupational tax provisions of federal law could meet Fifth Amendment standards if the Court imposed restrictions upon federal and state use of the information obtained as "in principle an attractive and apparently practical resolution" of the problem. However, because of a contrary congressional intent the standards were not imposed. See *United States* v. *Freed,* 401 U.S. 601 (sustaining a use-restriction scheme).

Moreover, it is of major significance that Congress in 1970 believed that the transactional immunity standard was no longer—if it had ever been—a constitutional requirement. As had Congress in 1893 in reacting to *Counselman,* so Congress in 1970 enacted the instant use immunity statute on the basis of its interpretation of this Court's more recent decisions—

principally *Murphy*.[13] We now turn to Congress' considered judgment in this matter, which carries great weight.

B. IT IS THE CONSIDERED JUDGMENT OF CONGRESS THAT THE USE-IMMUNITY RESTRICTION OF SECTION 6002 IS AS BROAD AS REQUIRED BY THE FIFTH AMENDMENT

1. The legislative history of 18 U.S.C. 6002 reveals that Congress considered that provisions for "use" and "derivative use" immunity were both desirable—primarily in the fight against organized crime—and, even more significantly, constitutionally permissible. It shows that, relying on *Murphy* v. *Waterfront Commission*, 378 U.S. 52, Congress gave its judgment that it was providing immunity as broad as required by the privilege against self-incrimination.

The statute was enacted as part of the Organized Crime Control Act of 1970.[14] As initially introduced, it

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[13] An analogous change has taken place in regard to taxation. In *Eisner* v. *Macomber*, 252 U.S. 189, the court held that no tax could constitutionally be imposed on a common stock dividend. It used sweeping language that a stock dividend was not income within the meaning of the Constitution. So Congress in the Revenue Act of 1921, c. 136, 42 Stat. 227, 228, enacted that "A stock dividend shall not be subject to tax * * *." Then in *Koshland v. Helvering*, 298 U.S. 441, in 1936, the Court intimated that some stock dividends—as common on preferred, or preferred on common, where there was a change of proportional interest—might be taxable. So Congress has now changed the 1921 sweeping statute and has enacted that certain stock dividends are taxable. Section 305 of the Internal Revenue Code of 1954, 26 U.S.C. 305.

[14] Congress, in a statement of findings and purpose as to the Organized Crime Control Act as a whole, stated: "It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions,

was applicable only to grand jury and court proceedings. Shortly thereafter, in March 1969, the National Commission on Reform of Federal Criminal Laws, in an interim report, referred to the President and to Congress a proposed federal immunity statute, applicable to legislative and administrative proceedings as well. This provision was intended to replace existing, widely divergent, immunity statutes. The proposal recommended use and derivative use immunity rather than transactional immunity. The Commission concluded (Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 30, 91st Cong., 1st Sess., p. 288):

> We are satisfied that our substitution of immunity from use for immunity from prosecution meets constitutional requirements for overcoming the claim of privilege.

The following month, the President, in a message on organized crime, recommended this proposal to the Congress, stating (H. Doc. No. 91–105, 91st Cong., 1st Sess., p. 5):

> [W]e need a broad general immunity law to cover all cases involving the violation of a Federal statute. I commend to the Congress for its consideration the recommendations of the National Commission on Reform of Federal Criminal Laws. Under the Commission's proposal, a witness could not be prosecuted on the basis of anything he said while testifying, but

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and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." 84 Stat. 922, 923.

> he would not be immune from prosecution based on other evidence of this offense. Furthermore, once the government has granted the witness such immunity, a refusal then to testify would bring a prison sentence for contempt. With this new law, government should be better able to gather evidence to strike at the leadership of organized crime and not just rank and file. * * *

Following hearings, the Senate and House Committees reported in part as follows:

> * * * This statutory immunity is intended to be as broad as, but no broader than, the privilege against self-incrimination. * * * It is designed to reflect the use-restriction immunity concept of *Murphy* v. *Waterfront Commission,* 378 U.S. 52 (1964) rather than the transaction immunity concept of *Counselman* v. *Hitchcock,* 142 U.S. 547 (1892). The witness is also protected against the use of evidence derivatively obtained. The statutory language is phrased in the terms of present law. See *Wong Sun* v. *United States,* 371 U.S. 471, 488 (1963). * * *

S. Rep. No. 91–617, 91st Cong., 1st Sess., p. 145; H. Rep. No. 91–1549, 91st Cong., 2d Sess., p. 42. See also S. Rep. No. 91–617, pp. 51–56, 107–108 (comments of the Department of Justice). These reports show that Congress was fully aware of the pronouncements of this Court and that the congressional choice was deliberate. Congress intended to give only the immunity it believed to be required by the Constitution and desired to protect the witness with a rule akin to the exclusionary rule.

A like intent was manifested at the hearings. Congressman Poff of Virginia, who introduced the bill

in the House, and who served as Vice-Chairman of the Commission on Reform of the Federal Criminal laws, explained that under the proposed bill (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11157 and H.R. 12041, 91st Cong., 1st Sess., p. 30):

> * * * the immunity grant would constitute a ground for the suppression of the use of compelled testimony and the fruits of that testimony, rather than a total defense. It would be a use restriction, a use restriction similar to the exclusionary rule which is now applied against such things as involuntary confessions, evidence acquired from unlawful searches and seizures, evidence acquired in violation of the Miranda warnings, to cite only a few examples. The witness could be prosecuted for his crime under this bill, provided the evidence used against him is independent of and untainted by the compelled testimony or its fruits.

The attention of the Senate Committee was directed to a report of Professor Robert G. Dixon, National Law Center of George Washington University and consultant to the National Commission on Reform of Federal Criminal Laws. He stated in part (Hearings before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary on S. 30, 91st Cong., 1st Sess. p. 310.):[15]

> Absolute immunity, acting like a *pardon for* all offenses related to the testimony, not only exonerates the witness for his offense under the

[15] This report is also set forth in Dixon, *Comment on Immunity Provisions*, National Commission on Reform of Federal Criminal Laws, Working Papers, Vol. II, pp. 1405–1444.

> statutes being administered by the agency conferring immunity, but also exonerates him for his offenses under other federal or state statutes in all instances where the offense relates to the area concerning which he testified. Under absolute immunity a mistake in granting immunity is very costly to society.
>
> A use-restriction rule, by contrast, only limits the interrogating agency * * * (and other agencies) in regard to use of the testimony and leads derived therefrom. * * *

The use immunity provision reflects neither a congressional dissatisfaction with the privilege nor a denigration of Fifth Amendment rights. Rather, it reflects a congressional judgment that complete transactional immunity exceeds the requirements of the Fifth Amendment. The present use immunity is based on a policy decision that the immunity granted be "as broad as, but no broader than, the privilege against self-incrimination" (S. Rep. 91–617, *supra*, p. 145).[16] Congress recognized that by preventing "immunity baths" society could avoid an intolerable result that could be brought about under a transactional statute by inter-agency mistakes or corruption.

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[16] Professor Dixon further stated (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11157 and H.R. 12041, 91st Cong., 1st Sess., p. 58):

> The proposed revision does not undercut the Fifth Amendment. It implements it, and in the process corrects a statutory error more than 75 years old. No honest citizen need fear it; no dishonest citizen need fear it; no criminal need fear it. The only persons aggrieved by the proposed change would be those seeking an extraordinary gratuity for crime.

Finally, the legislative history shows that Congress had the benefit of an experienced judgment on whether a factual hearing would be feasible and constitutionally adequate. Judge Edwards of the United States Court of Appeals for the Sixth Circuit and a member of the National Commission on Reform of Federal Criminal Laws expressed the view that the hearings on taint would "not [be] an impossible burden for the courts to carry" since the courts had already faced that problem in other contexts and "have built up a backlog of experience." (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11157 and H.R. 12041, 91st Cong., 1st Sess., p. 53). Cf. *Alderman* v. *United States,* 394 U.S. 165.

C. JUDICIAL ADMINISTRATION OF SECTION 6002 CAN FAIRLY SAFEGUARD THE PRIVILEGE AGAINST SELF-INCRIMINATION

In the great majority of instances in which immunity has been granted under Section 6002, there will be no subsequent federal prosecution for matters testified to; in those cases in which such prosecution is appropriate the factual determination of the question whether evidence is tainted is manageable. It is similar to, and no more difficult than, determinations that must be made under a transactional immunity standard and in the administration of other constitutional guarantees.

The immunity provision involved in this case was not passed for the purpose of enabling law enforcement officials to compel self-incriminating information from witnesses and then prosecute them for routine

matters. As the Assistant Attorney General in charge of the Criminal Division of the Department of Justice advised the House Subcommittee conducting the hearings on the bill (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary on H.R. 11157 and H.R. 12041, 91st Cong., 1st Sess. p. 47):

> As a practical matter, where the witness has elected to testify under this statute, and he has been used, it would be a most unusual circumstance for the Government that used him to turn around and prosecute him.[17] * * *

This policy is reflected in the guidelines that the Department of Justice has promulgated to assist the United States Attorneys. These guidelines state in part (Memo. No. 595, Supp. 1, September 2, 1971, p. 5):

> It should be clearly understood, however, that it is the policy of the Department under the new use immunity statute to avoid future

[17] Other statements also reflect that it was only in the unusual case that prosecution of an immunized witness was intended. As Judge Edwards, a member of the Commission on Reform of Federal Criminal Law, remarked in his testimony at the House Hearings (Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, on H.R. 11157 and H.R. 12401, 91st Cong., 1st Sess., pp. 53–54):

> * * * in most instances a grant of immunity is going to be made to a witness who isn't going to be prosecuted at all. That is probably the most important aspect of the whole matter. The prosecution will have just as much of an interest in protecting the interests of the person who has served the purposes of law enforcement in that regard as can be. As a consequence, fears for the person who has willingly cooperated under the grant of immunity are, I think, probably more fanciful than real.

> prosecutions of witnesses for offenses disclosed by such witnesses in their responses to questions after a grant of use immunity; such a prosecution shall not be initiated unless the matter is first referred to the appropriate Division of the Department in a written communication recommending prosecution and explaining the unusual circumstances which are felt to justify prosecution, unless the Assistant Attorney General in charge of such Division expressly recommends in a written communication to the Attorney General that the prosecution be authorized, and unless the Attorney General personally signs an authorization permitting the undertaking of the prosecution.

A practical reason for refraining from subsequent prosecution of a person who provides information is that the government has a vital interest in assuring the continued and unimpeded flow of information concerning criminal activities, and this interest may be furthered if a witness believes he will not be prosecuted.

There are, however, some circumstances in which a witness would appropriately be prosecuted after being compelled to testify, and in which transactional immunity would clearly provide an overly broad "gratuity." If a witness testifies before a grand jury without asserting any claim of privilege and repeats his grand jury testimony at a subsequent criminal trial involving others only after he is compelled to testify under the statute, he still may be prosecuted upon the

basis of independent evidence of his guilt.[18] A defendant who has entered a guilty plea (or been convicted without testifying himself) and is awaiting sentence may clearly be compelled to testify without being given immunity for the offense to which he has pleaded guilty (or of which he has been convicted).[19] Apart from these situations, there may be other circumstances in which an immunized witness who directly discloses his criminality can and should be prosecuted.

The privilege, of course, is applicable not only where criminality is directly disclosed, see *Mason* v. *United States,* 244 U.S. 362, but in every situation where the answer to a particular question might provide a "link in the chain of evidence needed to prosecute" the witness. *Hoffman* v. *United States,* 341 U.S. 479, 486. The government, however, may have overwhelming evidence to prove the "link" before the witness testifies. It may be interested only in other information possessed by the witness, and yet its questions may lead to testimony showing the "link." In such circumstances, the government should be able to prosecute the witness if it later learns from other independent evidence that the witness committed a crime, especially a crime more serious than the one concerning

[18] Compare *In re Neff*, 206 F. 2d 149 (C.A. 3), with *Ellis* v. *United States*, 416 F. 2d 791 (C.A.D.C.), setting forth contrary views as to whether a waiver of the Fifth Amendment privilege before the grand jury carries over to the trial.

[19] After sentencing, the conviction would remove the basis for a Fifth Amendment claim as to the crime for which the witness has been convicted. See *Reina* v. *United States*, 364 U.S. 507, 512–513.

which he was called to testify. In the latter circumstance, the criminality is separate from the reason for the compulsion and there is no "inquisition" connected to the offense which is the subject matter of the subsequent indictment.

Another reason for allowing the government the right to prove its case is untainted is that the government may need only the testimony of a particular witness in a limited area in which it would be willing to give "absolute immunity" as to any matter to which the witness testifies. But, when the witness is called at a trial, the determination of the extent of his cross-examination will rest in large measure with the defense and may embrace areas not covered by the prosecution. If transactional immunity is necessary, the witness may be given immunity on the basis of cross-examination either as to matters unanticipated by the prosecution or as to matters with respect to which the prosecution may possess overwhelming evidence. The single sovereign, therefore, may not have an unfettered "choice of exchanging immunity for the needed testimony." *Murphy* v. *Waterfront Commission,* 378 U.S. 52, 98 (concurring opinion of Mr. Justice White). As we have already stressed, the very purpose of a "use" rather than a "transactional" statute is to permit some legitimate governmental leeway in the investigation of crime while at the same time affording the witness the full safeguards to which the privilege entitles him.

Contrary to the suggestion in Mr. Justice Brennan's dissent in *Piccirillo* v. *New York,* 400 U.S. 548, 567–569, the possible "uncertainties" of the fact-finding process are not a reason for rejecting use immu-

nity as constitutionally insufficient. It should be emphasized that in determining whether an immunized witness can be prosecuted, the burden of proof will rest upon the prosecution. This burden will be a heavy one. In any case where significant information is first divulged in the witness' testimony, it will be difficult as a practical matter for the government to show that its case does not arise from some use of the compelled testimony. Since there is a constitutional right involved, the government will meet its burden in every case only if it shows convincingly that its evidence is not tainted. Cf. *Chapman* v. *California,* 386 U.S. 18.

When the witness is compelled to testify by force of the statute, he generally will have counsel available who can familiarize himself with the implications of the questions in the settings in which they are being asked. See *Hoffman* v. *United States,* 341 U.S. 479. The assistance of counsel at this time can substantially assure that the witness will be protected from any improper future prosecution. Cf. *United States* v. *Wade,* 388 U.S. 218.

Moreover, the mere possibility of error in the fact-finding process has never been accepted by this Court as a sufficient basis to require total immunity from prosecution. "The privilege protects against real dangers, not remote and speculative possibilities," *Murphy, supra,* 378 U.S. at 102 (concurring opinion of Mr. Justice White). "The central standard for the privilege's application has been whether the claimant is confronted by substantial and 'real,' and not merely trifling or imaginary, hazards of incrimina-

tion." *Marchetti* v. *United States,* 390 U.S. 39, 53. Violations of the Fourth Amendment have been rectified by an exclusionary rule resting on a similar fact-finding process, *e.g., Mapp* v. *Ohio,* 367 U.S. 643, not by a ban on prosecutions; and the coerced confession cases illustrate that the Fifth Amendment does not require an absolute immunity in every case where a person is compelled to give evidence which may incriminate him. In those cases and in other cases where incriminating evidence has been obtained in violation of the Fifth Amendment, this Court has rejected the view that a person thereby becomes immune from prosecution. See, *e.g., United States* v. *Blue,* 384 U.S. 251, 255; *Miranda* v. *Arizona,* 384 U.S. 436. The remedy that accrues to the accused, like the remedy applicable to Fourth Amendment violations, is that the confession as well as any leads derived therefrom are excluded from evidence. The government is precluded from using the confession as substantive evidence against an accused in any way—directly or indirectly. It would be anomolous, we submit, to give a more stringent remedy in the case where the witness is represented by counsel and the immunized testimony has been recorded in a court, administrative or legislative proceeding.[20] See Mr. Justice White concurring in *Murphy, supra,* 378 U.S. at 103.

Finally, a rule of transactional immunity is not a cure for the complexities of fact-finding that typify

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[20] Significantly, the "same transaction" test has never been adopted under the double jeopardy clause of the Fifth Amendment. Cf. *Ashe* v. *Swenson,* 397 U.S. 436.

the protection of constitutional rights. Administration of that rule also requires ascertainment of whether evidence is "tainted" when a prosecution arises out of matters not testified to but with respect to which compelled testimony may have provided leads.[21] If it be assumed that courts can manage this inquiry, as well as the complex inquiry what precisely constitutes testimony concerning a matter for which a witness is subsequently prosecuted, see *Piccirillo* v. *New York,* 400 U.S. 548, 555, 573–574 (dissenting opinion of Brennan, J.), there is no reason to suppose they cannot administer a use and derivative use immunity statute in a manner that accords fairness to the Fifth Amendment rights of defendants.

II

THE FIFTH AMENDMENT DOES NOT PROHIBIT THE ADOPTION OF AN IMMUNITY STATUTE

In *Ullmann* v. *United States,* 350 U.S. 422, this Court held that the Fifth Amendment does not prohibit compulsory or otherwise self-incriminating testimony under an immunity statute of proper scope. In so ruling, it reviewed various objections to such a statute, and adhered to its earlier decision in *Brown* v. *Walker,* 161 U.S. 591, rejecting an argument that that decision should be overruled. Subsequently, in *Murphy*

[21] For example, if in an investigation of interstate car thefts a witness admitted participating in the theft of a particular automobile, and on the date on which he admitted having the car, the car had been seen near the location of a bank robbery, the government in a prosecution of the former witness for bank robbery would have to establish that its evidence was obtained independently of the testimony.

v. *Waterfront Commission,* 378 U.S. 52, this Court again recognized that such statutes may be constitutionally valid. Petitioners, who did not ask for reexamination of either *Brown* or *Ullman* in their petition for a writ of certiorari, now ask this Court to overrule these decisions (see Petitioners Brief, pp. 13–22). We submit that there is no sound reason to depart from the now settled rule that the Fifth Amendment does not prohibit a valid immunity statute. See *Piccirillo* v. *New York,* 400 U.S. 548, 562–563 (dissenting opinion of Mr. Justice Brennan).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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